D.T.E. 03-47

Petition of Commonwealth Electric Company, Cambridge Electric Light Company, and Boston Edison Company, d/b/a NSTAR Electric, and NSTAR Gas Company for approval of tariffs to provide recovery for costs associated with their obligations to provide employees pension benefits and post-retirement benefits other than pensions.

INTERLOCUTORY ORDER ON MOTION TO DISMISS

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I. INTRODUCTION AND PROCEDURAL HISTORY

On April 16, 2003, Commonwealth Electric Company, Cambridge Electric Light Company, Boston Edison Company, and NSTAR Gas Company (collectively"Companies") filed with the Department of Telecommunications and Energy ("Department") tariffs[1] designed to establish a reconciliation adjustment mechanism to provide for the recovery of pension and post-retirement benefits other than pensions ("PBOP") costs for each of its distribution companies ("Filing"). The Department docketed this matter as D.T.E. 03-47.

On May 20, 2003, pursuant to notice duly issued, the Department conducted a public hearing. The Attorney General of the Commonwealth ("Attorney General") intervened pursuant to G.L. c. 12, § 11E. The Department also granted limited participant status to Fitchburg Gas and Electric Light Company, Keyspan Energy Delivery New England, Massachusetts Electric Company, Western Massachusetts Electric Company, and Associated Industries of Massachusetts.

On June 5, 2003, the Attorney General filed a motion to dismiss the Companies' Filing ("Motion"). The Attorney General also requested that the Department stay the ongoing proceedings until the Department acts upon his motion ("Motion to Stay"). On June 12, 2003, the Companies filed oppositions to the Motion ("Opposition") and to the Attorney General's

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[1] The Companies' tariffs list May 1, 2003 as the effective date. On April 23, 2003, the Department suspended the tariffs until August 1, 2003. On June 13, 2003, the Department further suspended the tariffs until October 1, 2003.

Motion to Stay ("Opp. to Stay"). The Attorney General replied to the Opposition on June 20, 2003 ("Reply").

II. DESCRIPTION OF THE COMPANIES' PROPOSAL

The Companies' proposed annual adjustment mechanism is a surcharge or credit to base distribution rates that establishes a new level of recovery of pension and PBOP expense (Filing at Exh. NSTAR JJJ at 30). The mechanism is designed to reconcile the annual amounts booked by the Companies in accordance with Financial Accounting Standard ("FAS") 87[2] and FAS 106[3] with the annual pension and PBOP expense amount included in the Companies' base rates (id. at 29). There are three components to the proposed annual adjustment mechanism: (1) an increase in the amount the Companies collect from ratepayers annually for pension and PBOP costs from the current $37 million to approximately $75 million, (2) a reconciliation of the amount collected from ratepayers with the FAS 87 and FAS 106 expenses, and (3) an assessment of carrying charges on the money the Companies have paid but not collected in rates (id. at Exh. NSTAR JJJ at 30-33). The proposed annual adjustment mechanism would commence January 1, 2004 (id. at Exhs. Boston Edison Company Tariff, § 1.03; Cambridge Electric Light Company Tariff, § 1.03; Commonwealth Electric Company Tariff, § 1.03; NSTAR Gas Company Tariff, § 1.03).

The Companies state that the Filing gives effect to the accounting treatment approved by the Department in NSTAR Electric/NSTAR Gas Company, D.T.E. 02-78 (2002). In

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[2] FAS 87 provides the guidelines for pension accounting.

[3] FAS 106 provides the guidelines for PBOP accounting.

support of their proposal, the Companies present evidence of the volatility of pension and PBOP expense,[4] cost of pension and PBOP expense,[5] and the material effect[6] of these factors have on their financial integrity (Filing at Exh. NSTAR JJJ).

III. ATTORNEY GENERAL MOTION TO DISMISS

A. Attorney General

The Attorney General asks that the Department dismiss the Companies' Filing for three reasons. The Attorney General argues that the Filing is a single-issue rate case, violates the merger rate freeze approved in BEC Energy/Commonwealth Energy System, D.T.E. 99-19 (1999), and violates reporting directives contained in D.T.E. 99-19 at 86, 93-94 (Motion at 1-2).

First, the Attorney General argues that the Filing inappropriately seeks to increase the amounts recovered for pension and PBOP in distribution rates without a comprehensive review of the Companies' costs and revenues (Motion at 1-2). As such, the Attorney General claims that the Companies' Filing is a single-issue rate case (id. at 2). The Attorney General contends

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4 The Companies submitted testimony that describes the way in which the application of mandated accounting standards, when coupled with financial market changes, creates large swings in what must be booked for accounting purposes (Filing at Exh. NSTAR-JJJ at 9-10).

5 The Companies submitted testimony that states that they anticipate contributing over $100 million during 2003 to their pension and PBOP plans (Filing at Exh. NSTAR-JJJ at 17).

6 The Companies submitted testimony that states that the volatility and magnitude of costs involved impair the financial integrity of the Companies (Filing at Exh. NSTAR-JJJ at 3).

that the Department's doctrine against single-issue rate cases requires us to dismiss the Companies' Filing (id. at 3-4, citing Default Service, D.T.E. 02-40, at 18-20 (2003); Massachusetts-American Water Company, D.P.U. 95-118, at 175 (1995); Housatonic Water Works Company, D.P.U. 95-81, at 3 (1996); Commonwealth Gas Company, D.P.U. 92-151, at 4 (1992); Boston Edison Company, D.P.U. 92-23/92-24, at 4 (1992)).

The Attorney General claims that even if the Department's doctrine against single-issue rate cases is not applicable to the Companies' Filing, the Supreme Judicial Court ("SJC") has addressed the appropriate method for review of a reconciling adjustment mechanism similar to the one presented by the Companies in their Filing (Reply at 1). The Attorney General argues that the Supreme Judicial Court requires that a new reconciling adjustment mechanism must be reviewed within the context of a rate proceeding under G.L. c. 164, § 94 (id., citing Consumers Organization for Fair Energy Equality v. Department of Public Utilities, 368 Mass. 599, 606-607 (1975)). Because the Companies have not filed a rate case, the Attorney General concludes that the Department should dismiss the Filing (Reply at 1).

Second, the Attorney General argues that the Companies' Filing seeks recovery of pension and PBOP expenses from 2002 and the first eight months of 2003 (id. at 5). The Attorney General claims that such recovery directly contravenes the provisions of D.T.E. 99-19, at 4, 22-28, which imposed a four-year general rate freeze as part of the Companies' merger plan and, therefore, the Department should dismiss the petition (id. at 5-6).

Third, the Attorney General asserts that the Companies' Filing is a request for rate relief (id. at 6-7). According to the Attorney General, D.T.E. 99-19, at 86, 94 requires the Companies to provide to the Department both a report of cost-saving measures taken and results achieved during the rate freeze and a proposal for an allocation method encompassing the entire corporate system created by the merger upon the filing of such a future rate relief proceeding (Reply at 6-7). The Attorney General argues that because the Companies have not filed these reports in this docket, the Department should dismiss the Filing (id. at 7).

B. Companies

The Companies state that their proposal is not a single-issue rate case because it does not increase base rates (Opposition at 4-5). The Companies continue that even if the Filing is a single-issue rate case, precedent permits not only its review but its approval (id. at 5-7, citing Cambridge Electric Light Company, D.P.U. 490 (1981); Capital Recovery, D.P.U. 859 (1982); Default Service, D.T.E. 02-40-B (2002)). Furthermore, the Companies argue that the Supreme Judicial Court has recognized the purpose and advantages of adjustment clauses that operate outside of base rates such as that proposed by the Companies (id. at 7, citing Consumers, 368 Mass. at 606). The Companies also state that the Filing does not violate the merger rate freeze because, if approved, no rates will increase until January 1, 2004, months after the expiration of the rate freeze (id. at 14-15).[7] Finally, the Companies assert that they

[7] Addressing the Attorney General's claim that the Companies seek recovery of expenses for 2002 and 2003, the Companies note that like other accrued expenses, the prospective level of pension and PBOP costs is based, in part, on past events (Opposition at 16).

have not violated any reporting directive in D.T.E. 99-19 because their rate freeze has not expired and they are not seeking rate relief under G.L. c. 164, § 94 (id. at 13-14).

IV. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.06(6)(e), authorizes a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988).[8] In Riverside, the Department denied the respondent's motion to dismiss, finding that it did not "appear [ ] beyond doubt that [the petitioner] could prove no set of facts in support of its petition."[9] Riverside at 26-27.

In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. Id. at 26-27. Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id.

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[8] Procedures for dismissal and summary judgment properly can be applied by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 783-786 (1980); Hess and Clark, Div. of Rhodia, Inc. v. Food and Drug Administration, 495 F. 2d 975, 985 (D.C. Cir. 1974).

[9] Although Riverside refers to Massachusetts Rule of Civil Procedure 12(b)(6), the Department has not adopted formally Rule 12(b)(6). See Attorney General v. Department of Public Utilities, 390 Mass. 208, 212-213 (1983) (rules of court do not govern procedure in executive Department).

V. ANALYSIS AND FINDINGS

A. Introduction

The Department has a high threshold for prevailing on a motion to dismiss. Riverside, D.P.U. 88-123, at 26; see also South Egremont Water Company, D.P.U. 94-161, at 4 (1995) . For the Attorney General to succeed on his Motion, the Department must find that the Companies are not entitled to relief under any facts that could be proved in support of their Filing. See, e.g., City of Waltham, D.T.E. 02-11, at 2 (2002). The Department in the past has shown reluctance to dismiss a case before the petitioner at least has had an opportunity to present and support its case through discovery and evidentiary hearing. Riverside, D.P.U. 88-123, at 26.

B. Single-issue Rate Case

The term "single-issue rate case" is generally understood to mean the investigation of a petition for base rate relief that concerns only one major issue. Default Service, D.T.E. 02-40-B at 18, citing Cambridge Electric Light Company, D.P.U. 490, at 2 (1982). The SJC has defined it as the change in rates "to account for a cost increase in relation to a single item expense." Attorney General v. Department of Telecommunication and Energy, 438 Mass. 256, 270-271 (2002).

Pursuant to G.L. § 164, c. 94, a general increase in rates may be allowed only after a full rate investigation.[10] In discharging its ratemaking functions, the Department maintains a

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[10] A full rate investigation is an adjudicatory process. The SJC has recently restated the distinction between an adjudicatory proceeding and a regulatory action. Sierra Club & (continued…)

general but hardly inflexible policy against so-called single-issue rate cases. See, e.g., Tax Reform Act, D.P.U. 87-21-A at 6, 7 (1987) (rate adjustment to reflect a change in the corporate income tax rate is not inconsistent with the Department's policy disfavoring single-issue rate cases); Default Service, D.T.E. 02-40-B at 18 (2003) (transfer of costs from distribution base rates to default service rates outside the context of a rate case does not amount to a single-issue rate case).

We are not persuaded by the Attorney General's contention that the Filing should be dismissed because it is a single-issue rate case. Whether the Filing constitutes a single-issue rate case is in dispute, but even if the Department ultimately decides that it is a single-issue rate case, there is no absolute bar to single-issue rate cases. See, e.g., Default Service, D.T.E. 02-40, at 20; Cambridge Electric Light Company, D.P.U. 490, at 2 (1982) (allowing Cambridge Electric Light Company to adjust base rates to recover increased property tax expense); Capital Recovery, D.P.U. 859, at 6 (1982) (allowing New England Telephone and Telegraph Company to adjust base rates to recover depreciation costs and expenses); see also, New England Telephone and Telegraph Company, D.P.U. 84-267, at 13 (1985) (dismissing as inappropriate single-issue ratemaking company's petition to adjust single expense item, which was supported by Attorney General). Rather, the Department exercises its judgment on a case-by-case basis. Default Service, D.T.E. 02-40, at 20; see also New England Telephone

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[10](…continued)
others v. Commissioner of the Department of Environmental Management & another, No. SJC-08857 (Mass. July 14, 2003) available at http://www.sociallaw.com/sjclip/sjcJuly03i.html.

and Telegraph Company, D.P.U. 84-267, at 9 (1985). Factors for consideration include the exigency of the problem and the importance of potential relief. See, e.g., Default Service, D.T.E. 02-40, at 20; D.P.U. 490, at 2 (reviewing and allowing company's single-issue rate petition, filed due to unexpectedly high city taxes and proposing solution yielding requisite additional revenue).

While we consider many factors in our investigations of reconciliation mechanisms and single-issue rate cases, there are two that are common to both: the presence of an extraordinary condition; and, a solution that does not burden the ratepayers with a rate case expense. In the present case, the Companies have presented facts concerning the volatility of pension and PBOP expenses, cost of pension and PBOP expense, and the material effect these factors have on their financial integrity (Filing at Exh. NSTAR JJJ). They have also proposed a solution to avoid negative effects on the Companies' business and, according to the Company, their ability to maintain a stable pension system (in a challenging economic climate) that will retain the skilled workforce necessary for quality customer service. Taking these facts as true, as the standard requires, we find that the Companies have presented sufficient facts to state a claim and to warrant further investigation.

In short, while we may regard the proposed reconciliation mechanism for pension costs as something other than a single-issue rate case, even were the proposal to be categorized as a single-issue rate case, there is no absolute bar to taking up or considering such matters, only a policy disposition against such consideration, which can be overcome if circumstances warrant.

Therefore, we deny the Attorney General's Motion regarding his claim that it is a single-issue rate case. We now consider the second basis for dismissal raised by the Attorney General.

C. Rate Freeze

The Companies are presently under a four-year general rate freeze, which began on the date of the merger and continues through September 2003. D.T.E. 99-19, at 4-5, 13, 22-28.

An integral part of the Department's rationale in approving the merger rate plan was that the Companies' customers would receive the benefit of four years of fixed distribution rates. Id. at 24. The Attorney General argues that the Companies' proposal would violate the terms of the rate freeze. The Companies note, however, that the first rate change would not occur until January 1, 2004, a full four months after the rate freeze ends. The freeze is on changes to rates before September 2003, not on mounting proposals before that date, to be effective after that date. Accordingly, we find that the Companies have provided sufficient facts to state a claim for relief. Therefore we deny the Attorney General's Motion regarding his claim that the Filing violates the merger rate freeze. We now consider the third basis for dismissal raised by the Attorney General.

D. D.T.E. 99-19 Reporting Requirements

In approving the Companies' merger, the Department directed the Companies to file a one-time report of cost-saving measures taken and results achieved during the rate freeze. D.T.E. 99-19, at 86, 94. The Department stated that the report would be due not later than 90 days after the end of the rate freeze "or not later than the filing by any of the four [C]ompanies of a future rate proceeding, should such a proceeding occur first." Id. Similarly, the

Department directed the Companies to provide their proposal for an allocation method encompassing the entire corporate system created by the merger within 90 days of the end of the rate freeze or when one of the Companies seeks rate relief under G.L. c. 164, § 94. D.T.E. 99-19, at 94.

The Companies have not provided the Department with the two reports identified in D.T.E. 99-19. The Attorney General argues that the Companies should have accompanied the Filing with the requisite reports. The Companies note, however, that their rate freeze has not expired and they have not filed a general rate case under G.L. c. 164, § 94.

The Department's directives required the filing of the requisite reports by the earlier of two dates: (1) 90 days after the end of the distribution rate freeze; or (2) the filing of a petition for rate relief.[11] Under the Department's first standard, the requisite reports are not yet due, because the four-year distribution base rate freeze has not yet expired. Concerning the Department's second standard, we view the terms "the filing by any of the four [C]ompanies of a future rate proceeding" and "the date that any one of the regulated operations files a petition for rate relief pursuant to G.L. c. 164, § 94" as used in D.T.E. 99-19 to be sufficiently synonymous, and to mean the filing of a general base rate proceeding. In this case, the Companies have not filed a general base rate case. Therefore, neither filing date event as set forth in D.T.E. 99-19 has yet been triggered. It would be premature to require the Companies to submit the reports with the Filing. Accordingly, we deny the Attorney

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[11] The Department's directives for the allocation method report further specified that the filing for rate relief was to be submitted pursuant to G.L. c. 164, § 94. D.T.E. 99-19, at 94.

General's Motion regarding his claim that the Filing violates the reporting directives in D.T.E. 99-19.

E. CONCLUSION

In this Order we have found that the Companies have presented claims of facts that, if found true, may entitle them to relief with respect to the three issues raised by the Attorney General: (1) single-issue rate case; (2) rate freeze; and (3) reporting requirements of D.T.E. 99-19. Therefore, we deny the Attorney General's Motion.

V. MOTION TO STAY

The Attorney General also requests that the Department stay the ongoing proceedings until the Department acts upon his motion (Stay at 1). In the alternative, the Attorney General requests that the Department resuspend the tariffs until October 31, 2002 to allow such time that permits a full investigation of the proposed tariffs (Stay at 1-2).

The Companies argue that a stay of the proceedings or a change in the suspension date is inappropriate (Opp. to Stay at 1). The Companies contend that a stay or a change in the suspension date would impair their ability to obtain approval of a specific rate recovery mechanism during 2003 (id. at 3).

Since the Attorney General filed his Motion to Stay, the Department has resuspended the tariffs until October 1, 2003. In addition, we are denying his Motion in this Order. For these reasons, the Motion to Stay is denied.

VI. ORDER

After due notice and consideration, it is

ORDERED: That the Motion to Dismiss filed by the Attorney General of the Commonwealth be and hereby is denied.

By Order of the Department,

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Paul B. Vasington, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner